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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
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| Petitions of Sprint PCS and AT&T Corp. | ) | |
| for Declaratory Ruling on Issues | ) | |
| Contained in the Access Charge Litigation | ) | |
| Sprint PCS v. AT&T | ) | WT No. 01-316 |

# JOINT COMMENTS OF WESTERN WIRELESS CORPORATION AND VOICESTREAM WIRELESS CORPORATION

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## SUMMARY OF THE PLEADING

Western Wireless Corporation and VoiceStream Wireless Corporation (the "Joint Commenters") favor grant of the Sprint PCS Petition for Declaratory Ruling, and denial of AT&T's opposing Petition for Declaratory Ruling. The Joint Commenters consider, however, that the mere acknowledgment by the Commission that CMRS carriers are entitled to seek and obtain compensation from IXCs such as AT&T for IXC traffic terminated on CMRS networks is insufficient to address the larger issues underlying the present dispute. CMRS carriers, unlike ILECs and CLECs, do not enjoy the benefits of a regulatory mechanism and a structure that confers the positive force of law on their efforts to be compensated for IXC access to their networks. In the absence of such a mechanism, they are left largely to their own devices to assert their claims, and enforce them if and when they are disputed by the IXC. This has resulted in unnecessarily increased costs to CMRS carriers and their end users, and an effective subsidy to IXC ratepayers. It is an unfair and unduly discriminatory situation that needs to be corrected by Commission action.

The Joint Commenters suggest that it is incumbent upon the Commission to fashion an appropriate regulatory scheme to address this uneven *status quo*, and propose that the CLEC access charge reform model could be modified to apply to the present situation. CMRS carriers would be afforded the right to file access tariffs with rates up to a specified benchmark level, and such rates would be given the "safe harbor" of a conclusion of lawfulness. CMRS carriers with costs justifying access charges higher than the benchmark rate would be given the opportunity to prove their entitlement to above-benchmark rates by presentation of a cost study.

Affording CMRS a structure and mechanism for the recovery of their costs will enhance competition, shift CMRS network access costs back to the IXC cost-causers where they belong,

and correct a long-standing inequity in the treatment of CMRS carriers in comparison to ILECs and CLECs. In addition, it will not eventuate significant regulatory involvement, but after implementation will be relatively self-policing, avoiding costly litigation and disputes such as the one that spawned the present proceeding.

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**JOINT COMMENTS OF**
**WESTERN WIRELESS CORPORATION**
**AND VOICESTREAM WIRELESS CORPORATION**

Western Wireless Corporation ("Western Wireless") and VoiceStream Wireless Corporation ("VoiceStream")[1] (hereinafter, the "Joint Commenters") by their undersigned counsel, hereby submit their joint reply comments in support of the Sprint Petition for Declaratory Ruling filed October 22, 2001, and in opposition to the AT&T Petition for Declaratory Ruling filed on the same date. As set forth in greater detail below, the Joint Commenters urge the Commission not only to declare in response to Sprint PCS' petition that IXCs must compensate CMRS carriers for the costs of terminating IXC traffic, but also to create a workable regulatory structure to facilitate recovery of those costs.

[1]Based in Bellevue, WA, VoiceStream is a leading provider of digital wireless telecommunications services. Currently serving over 6.3 million consumers, VoiceStream uses the GSM digital wireless platform, the standard used by over 70% of the world's wireless consumers. Together with its affiliates, VoiceStream holds licenses to serve over 273 million people, or 97% of the U.S. population.

## DISCUSSION

### I. The Commission must assist CMRS carriers in the recovery of the costs they incur in providing access services to IXCs by establishing a clear regulatory structure with the positive force of law

#### A. No legal impediment prohibits CMRS carriers from seeking and obtaining compensation for the access services they render to IXCs

Despite considerable discussions of historical developments,[2] purported *de facto* industry conventions, and descriptions of the Commission's prior temporary forbearance with regard to CMRS access rate issues,[3] no commenter in this proceeding has pointed to any legal provision that would prohibit CMRS carriers from recovering their access costs from IXCs. The fact that the Commission has not yet acted either to create a cost recovery scheme, or to prohibit cost recovery, is not particularly helpful in this analysis – it only means that this is a regulatory issue that it is yet to be settled decisively.

In fact, the Commission has recently requested public comment on issues very similar to the ones presented in this proceeding,[4] clearly signaling that it does not believe that recovery by CMRS carriers of their costs of providing access to IXCs is something that is legally foreclosed from the outset. Accordingly, there is no legal impediment to fashioning a regulatory mechanism for the recovery of these costs, one that will ensure that CMRS carriers are justly

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[2] *See* AT&T Petition for Declaratory Ruling at 5-9.

[3] *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services,* GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd at 1480 (1994).

[4] *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking in CC Docket 01-92, FCC 01-132 at ¶ 94 (released April 27, 2001) ("We also seek comment on whether access charges, when they apply to interexchange traffic under sections 201, 251(g) and 251(i), should also apply to CMRS carriers, and to what extent. In that context, commenters should also address whether CMRS carriers are entitled to receive access charges, or some additional compensation, for interexchange traffic terminating on their networks.")

compensated, consistent with the treatment afforded other carriers offering local telecommunications services.

### B. The present lack of a regulatory structure that facilitates the recovery of access costs by CMRS carriers is unfair, discriminatory and averse to the public interest

The comments filed in this proceeding reflect some differences in opinion as to whether CMRS carriers, CLECs and ILECs are sufficiently similar entities to warrant application of access charges based on historical justifications.[5] Importantly, however, there is no controversy whatsoever concerning the fact that CMRS carriers do incur costs in terminating IXC traffic,[6] that IXCs cause those costs to be incurred, and that, for the most part, CMRS carriers (unlike CLECs and ILECs) have not yet been able to recover those costs from the cost-causing IXCs. So apart from the various ways in which these entities can be grouped together or differentiated, they share a key characteristic: it costs them money to complete calls on their networks for unrelated third-party carriers such as AT&T and other IXCs.

In the case of both ILECs and CLECs, there are specific regulatory mechanisms in place that not only allow, but *facilitate* the recovery of these access costs by lending structure and the positive force of law to ILEC and CLEC efforts to be compensated. For example, ILECs file and maintain access tariffs, setting forth the exact rates, terms and conditions that must be observed if an IXC wishes to access the ILEC's local exchange network for the purpose of originating or terminating telecommunications traffic. Because ILECs have this long-established and highly-structured tariff system available to them, it is clear when an IXC accesses an ILEC network to originate or terminate traffic, that IXC is already on notice that it must comply with the

[5] *Compare, e.g.,* AT&T Petition for Declaratory Ruling at 19-20 *to* Cingular Wireless Comments at 2-4.

[6] *See, e.g.,* AT&T Petition for Declaratory Ruling at 14 (CMRS carriers "undoubtedly incur costs in delivering calls to and from AT&T's network").

published terms and conditions, and must pay a certain rate per minute of use. Moreover, once a reasonable rate is tariffed, the common law "filed rate doctrine" requires payment of the tariffed rate and ensures that the ILEC is full compensated for the services it has provided.[7] In the case of CLECs, the Commission has recently enacted rules that govern the manner in which access charges will be assessed, and has additionally established a system of "benchmark rates" that are conclusively lawful, meaning that the tariffed rates cannot be contested.[8] If a CLEC tariffs an access rate that does not exceed the relevant FCC benchmark, the IXC must pay that rate: again, the filed rate doctrine would apply, and ensures full compensation to the CLEC for the access services it provides.

Accordingly, all wireline ILECs and CLECs presently have the benefit of regulatory mechanisms and rate guidelines that lend structure and the positive force of law to their efforts to obtain compensation for the use of their networks to terminate IXC calls. In each case, the rates, terms and conditions of access to their networks may be specified precisely in an access tariff that ensures that IXCs fully compensate the ILEC or CLEC for the services it provides.

Most commenters in this proceeding agree that CMRS carriers, like wireline ILECs or CLECs, have the right to obtain compensation for the use of their networks by IXCs.[9] The

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[7] The "filed-rate doctrine" states that the rate filed in a tariff "is the only lawful charge" and "[d]eviation from it is not permitted upon any pretext." *AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998). Tariffed rates therefore are the "law" and are binding until and unless the FCC decides otherwise. *See Fry Trucking Co. v. Shenandoah Quarry, Inc.*, 628 F.2d 1360, 1363 (D.C. Cir. 1980). Consequently, the filed-rate doctrine imposes a "pay-and-claim" requirement: a party which believes a tariffed rate is unreasonable must *first pay and then* challenge the rate before the FCC. "Customers who claim that tariff rates are unreasonable may file complaints with the [FCC] under section 208 ... but may ***not*** automatically withhold payments of legally tariffed charges merely by asserting that the rates are unreasonable." *Communique Telecomm., Inc.*, 10 F.C.C. Rcd. 10399, 10405 (1995) (emphasis added).

[8] *See In the Matter of Access Charge Reform,* Seventh Report and Order, FCC 01-146, 16 FCC Rcd 9923 at ¶ 44 (2001) ("*CLEC Access Charge Order*").

[9] Of approximately 20 commenters in the proceeding, only USTA, AT&T, Qwest and WorldCom opposed compensation for CMRS carriers for IXC access to their networks. Even

crucial difference, however, is that the Commission has not yet enacted a comprehensive regulatory scheme that *facilitates* the recovery of these undisputed costs by CMRS carriers, by lending structure (tariffs) and the positive force of law (the Filed Rate Doctrine) to their efforts to be compensated for use of their networks. This regulatory "vacuum" makes all the difference. Without the ability to file legally binding tariffs, CMRS carriers have been simply left to their own devices to seek compensation from IXCs. And, as is evident from Sprint PCS' Petition, IXCs such as AT&T have refused to pay, resulting in expensive, time-consuming and circuitous litigation, ultimately resulting in the proceeding at hand.[10] Even assuming the Commission clarifies that CMRS carriers are indeed entitled to seek and obtain payment for terminating IXC traffic, the lack of suitable regulatory mechanisms to facilitate recovery of the compensation due CMRS carriers essentially makes it difficult or impossible for them to obtain payment.

This is the root of the unfairness, and the reason that AT&T and other IXCs have seen fit to discriminate against CMRS carriers, paying them *nothing* to use their networks, while at the very same time paying other carriers in excess of 10 cents per minute of use for the use of their networks without any apparent complaint.[11] Essentially, AT&T discriminates against CMRS carriers and treats them unjustly because, in the present regulatory environment, it *can.*

When AT&T uses ILEC and CLEC networks to complete calls, those entities gain access charge revenues that are intended to compensate them for this use. But when an IXC uses a CMRS carrier's network to complete calls, it puts that CMRS carrier in a net loss position, compelled to recover elsewhere the costs that it cannot easily recover from the cost-causer. The

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the small and rural ILECs that filed comments generally supported Sprint's Petition and favored fair compensation for CMRS carriers based on usage.

[10] *See* Sprint Petition for Declaratory Ruling at 2-4.

[11] Such high access rates are typically associated with rural independent telephone companies with demonstrably high costs.

ultimate outcome is that CMRS end users are compelled to foot the IXC's delinquent bill, resulting in higher rates. Because the Commission has not yet put in place a suitable structure to facilitate recovery by CMRS carriers of access charges from IXCs, CMRS end users are forced to pick up the tab for AT&T's "free ride," something that ILEC and CLEC customers do not have to do.

From a policy standpoint, this is not in the public interest, for several reasons. The lack of a suitable regulatory mechanism enabling CMRS carriers to recover their valid costs unfairly discriminates against an entire class of end users by compelling them to absorb costs neither they, nor their carrier, have caused. Moreover, it involuntarily compels CMRS end users to subsidize the rates of customers of unrelated IXCs, who are perhaps enjoying somewhat *lower* rates than would otherwise be the case if their carrier were not able to ignore a portion of the costs it causes.[12]

The problem of being unable to recover IXC access costs is not just an internal one plaguing CMRS carriers and their customers, but it also has external competitive implications. Since CMRS carriers are the only type of carrier providing local telecommunications services that do not receive compensation for termination of IXC traffic, they are thereby weakened relative to their competitors in the local market segment, and this adversely affects their ability to compete. Wireless carriers are major competitors for the local exchange customer, particularly in residential areas in which CLECs do not yet have significant penetration. The uneven playing field created by the uneven regulatory treatment of CMRS carriers with regard to access charges severely undercuts inter-modal competition by unfairly favoring one class of competitor over the

[12] *See* WorldCom Comments at 11 ("Given the highly competitive nature of the long distance business, it is inevitable that wireless access charges would entail higher long distance prices for consumers.")

other. This is unlikely to be beneficial to the consumer, constraining the range of choices he or she will consider when choosing a carrier.

In sum, the Joint Commenters contend that it is not enough for the Commission to simply confirm that CMRS carriers are legally entitled to compensation for the use of their networks by IXCs. Something more is necessary. The Commission must exercise its authority to create a regulatory scheme that, as in the case of ILECs and CLECs, *facilitates* the recovery of these costs by putting in place a mechanism having the positive force of law that can specify rates, terms and conditions with which IXCs must comply. Such a mechanism would have the added benefit of shifting the cost of IXC access away from the CMRS end user and back to the IXC cost-causer, consistent with established FCC policy.[13] It would also enhance CMRS carriers' ability to compete in the local exchange market for customers, invigorating beneficial inter-modal competition.[14]

## II. On a going-forward basis, creation of an access charge regime for CMRS carriers would address the present regulatory inequity, and would not require pervasive regulation or setting of end user rates

### A. CMRS carriers should file access tariffs with rates capped at a conclusively lawful benchmarked level

The Joint Commenters believe that allowing CMRS carriers to file access tariffs, with a specified benchmark rate that is conclusively lawful, would be an acceptable choice that would

[13] *See, e.g., In the Matter of Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd. 12962 (2000) ("*CALLS Order*") at 12999-13000 ¶¶ 94-95.

[14] Some commenters have asserted that bill-and-keep should apply to access service between IXCs and CMRS carriers. *See, e.g,* WorldCom Comments at 9-11; CTIA Comments at 2-4; AT&T Petition for Declaratory Ruling at 18; Qwest Comments at 3-5; USTA Comments at 1-2. The Joint Commenters consider bill and keep acceptable only if it is industry-wide, applicable to relationships with *both* IXCs and all LECs. In such a scenario, where bill-and-keep is universally applicable to all intercarrier compensation between CMRS carriers and other entities, it would no longer be necessary to maintain an access charge regime with regard to IXCs. However, it is grossly unfair to impose bill-and-keep only in the context of IXC access charges, while leaving in place the present system of reciprocal compensation and access charges for other types of traffic exchanges with CMRS carriers.

require relatively modest regulatory resources to implement and maintain. This is the approach taken by the Commission with regard to the reform of CLEC access charges, and it would be a reasonable method of approaching the issue in the CMRS context. The Commission would have to conduct some analysis of the industry to determine reasonable rate "benchmarks," and thereafter CMRS carriers could file access tariffs up to, but not beyond the benchmark rate, entitling them to a "conclusive" determination of reasonableness.[15] This rate prescription would provide the needed certainty that IXCs would pay the tariffed rates, while at the same time providing IXCs with assurance that the rates are not excessive.[16]

The Joint Commenters consider that, when enacting a regulatory scheme including rate benchmarks, the Commission should leave open the possibility that a particular wireless carrier might have higher than normal costs, much as a rural wireline carrier has increased costs that must be recovered. Accordingly, the newly-promulgated rules should include provision for a CMRS carrier to present a cost study to demonstrate that it is entitled to charge access rates above the benchmark levels established. This would be consistent with the Commission's most recent treatment of rural wireline ILECs.[17]

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[15]In the absence of a cost study analyzing CMRS carriers' costs, one possible alternative might be to examine the utilization of NECA rates as a proxy. CMRS carriers are somewhat similar to rural ILECs in that they typically pay for long transport and have a widely-dispersed customer base. NECA rates may in fact be understated, since CMRS carriers incur other costs that NECA carriers do not have, such as higher switching costs, and CMRS carriers must purchase relatively expensive wireline transport from ILECs.

[16] *See CLEC Access Charge Order* at ¶ 60 (rates at or below benchmark deemed "conclusively reasonable" are not subject to Section 208 complaints).

[17] *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers,* CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 01-304 (rel. Nov. 8, 2001).

### B. ILEC reciprocal compensation rates should not be the benchmark for CMRS access charges, but rather they should reflect actual costs

The Joint Commenters disagree with AT&T's assertion that CMRS access charge rates should be set at a level that is comparable to reciprocal compensation rates, or that they should be TELRIC-based. Rather, CMRS access charges should be set at levels reflecting the carriers' actual costs. TELRIC for CMRS access is not something required by the Act: that costing regime was intended to encourage market entry in a situation where the entrenched monopoly carrier owned all of the assets and facilities new market entrants needed to access. No such situation exists in the CMRS market. It is not sensible to price CMRS access at a price that would recover the incremental cost of a theoretically-efficient system, but rather CMRS access costs should reflect the companies' actual experience in the marketplace, using present technology.[18] In fact, imposing a TELRIC standard on CMRS access rates would again unfairly discriminate against them in comparison with other similarly-situated carriers that offer local telecommunications services. Neither the RBOCs, nor the NECA carriers, nor the CLECs, are presently required to price their access charges at TELRIC rates. Nor are any entities required to mirror reciprocal compensation rates in their access charges. Singling out CMRS carriers for this type of treatment would simply continue the present inequitable system, accruing to the advantage of other types of carriers, and discouraging competition in the local sector.

### C. The Commission's recent experience in the CLEC context demonstrates that CMRS access rates may be controlled without pervasive regulation

AT&T and other IXCs contend that allowing CMRS carriers to charge for access to their systems might require many layers of pervasive state and federal regulation, up to and including

[18] *See, e.g,* Salmon PCS LLC Comments at 18-19.

regulation of end user rates.[19] However, this is nothing more than a baseless scare tactic. In fact, the Commission's recent experience with regard to CLECs provides a reasonable blueprint and starting point for structuring the CMRS access rate regime. Even though CLEC end user rates are not regulated by the Commission, the Commission did not feel the need to set caps on those rates to prevent "double recovery". In fact, the levels of CLEC end user rates are controlled by competitive market forces – if they are raised too high, a customer will flee to another substitutable provider. This is exactly the same situation in the present market for wireless telecommunications services. If a customer considers that Sprint PCS charges too much, he or she can change to Cellular One, or VoiceStream, or AT&T, or Cingular, or Nextel, or other providers that compete for his business. There is obviously no need for pervasive regulation in the CMRS industry, due to its highly competitive nature.[20] As noted above, the *only* regulation that is clearly needed to correct the present inequitable situation in the CMRS market is a structure facilitating recovery of IXC access costs -- and that is a relatively simple matter once the Commission determines a reasonable benchmark rate that can be tariffed. The establishment of conclusively lawful rates within the safe harbor established by Commission rules would, as in the CLEC industry, simply eliminate the possibility of access charge rate complaints, and it would be easily enforceable.[21]

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[19] *See* AT&T Petition for Declaratory Ruling at 3, and 20-27.

[20] *See* Comments of CTIA at 7 ("In a competitive market, such as CMRS, end-user prices coincide closely with a carrier's cost, and the Commission need take no role in regulating such prices.") *See also* Comments of Leaco Cellular, Inc. at 4 (". . . because of the highly competitive nature of the CMRS industry, the Commission can permit CMRS carriers to charge access without being regulated as LECs or using Part 69 LEC accounting rules.")

[21] On the other hand, in the unlikely event that an end user believed a CMRS carrier's rates to be unreasonable, that contention could be be asserted in the context of a complaint. At any rate, such a scenario is not a real worry for the IXC industry, and it is presumably only asserted in an attempt to make the regulation of CMRS access rates appear to be too unwieldy to attempt from the outset.

## CONCLUSION

Based on the foregoing, the Joint Commenters contend that the Petition for Declaratory Ruling submitted by Sprint PCS on October 22, 2001 should be granted, the AT&T Petition filed on the same date should be denied in its entirety, and a CMRS access charge regime established, in accordance with the above comments.

Respectfully submitted,

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Date: December 12, 2001

## CERTIFICATE OF SERVICE

I, the undersigned Michele Butler, a secretary in the law firm of Kelley Drye & Warren LLP hereby certify that true and complete photocopies of the foregoing "Joint Reply Comments" were served December 12, 2001 via courier and U.S. Mail on the following:

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